APPENDIX A

No. 7411—July 31, 1963

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

GILBERT ET AL, *Respondents*, *v.* HOISTING & PORTABLE ENGINEERS, LOCAL UNION No. 701, *Appellants*.

Appeal from Circuit Court, Multnomah County.

JAMES W. CRAWFORD, Judge.

Argued and submitted July 1, 1963.

Clifford D. O'Brien, Portland, argued the cause for appellants. On the briefs were O'Brien & Perkins.

Gunther Krause, Portland, argued the cause for respondents. On the brief were Krause, Lindsay & Nahstoll.

Before MCALLISTER, Chief Justice, and ROSSMAN, PERRY, SLOAN, O'CONNELL, GOODWIN and DENECKE, Justices.

AFFIRMED AS MODIFIED.

O'CONNELL, J.

This is a suit in equity brought against the Hoisting & Portable Engineers Local 701 by plaintiffs as representatives of all the members of the local union. Plaintiffs pray for the appointment of a receiver, for an accounting, and for other incidental relief.

The gravamen of the complaint is that four of the officers of the local union had failed to follow "democratic processes" in the conduct of the affairs of the union in various particulars. It is charged that these officers were elected as a result of a fraudulent elec-

tion in which they caused invalid ballots to be cast and that the officers, for the purpose of appropriating union property for unauthorized purposes, have refused to provide for the election of trustees and auditors as required by the bylaws of the union.

The trial court found that plaintiffs had failed to sustain their charge of fraudulent election, or that there had been a misappropriation of funds justifying the appointment of a receiver. However, the court found that defendants, in conducting the affairs of the union, had disregarded the union constitution in certain respects affecting democratic processes.[1] Although the trial judge found that there was not sufficient evidence to justify removal of the defendant officers, he considered their previous neglect in observing the democratic processes of the union a ground for setting up safeguards in the conduct of the next

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[1] The trial judge's memorandum opinion contains the following statement:

"3. *As to Abolition of Democratic Processes.* This challenge to defendants' conduct of Local 701, its members' meetings, controls, failure to follow constitutional directives, as evidenced by absence of auditors, trustee *appointments*, inability of members to secure requested information regarding funds, elections, etc., constitute the more serious criticism of defendants' operations."

The court continued:

"4. * * *, we now address ourselves to the '*Democratic processes*' phase of charge and inquiry. As stated above, I am of the opinion defendants have in certain respects disregarded the constitution. Conduct of meetings (however, only one or two were testified to) has been criticized, and some evidence suggests unlawful means employed when observance of the by-laws would have accomplished the same result. The Financial Secretary and Business Manager, P. R. Wages, has laid himself open to charges of 'Cronyism' and suspicion of selection of officials and committeemen who might be inclined toward Wages' policies and therefore lacking in independence. Generally, it would seem, however, these men have discharged their responsibilities adequately; the situation, however, should

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union election which was soon to be held. To this end the following order was entered:

"5. For the purpose of participating in supervising the election of officers and officials of the defendant Local 701 in June 1962, the certified public accountant firm of Pattullo and Gleason be and it hereby is appointed by the Court with instructions to report the conduct and results of the election to the Court.

"6. For the purpose of advising the Court as to the assets, income and expenses of the defendant Local 701 the certified public accountant firm of Pattullo and Gleason be and it hereby is appointed to check the quarterly audits of the business of said defendant and to report thereon to the Court each quarter from date hereof not to exceed one year.

"7. Jurisdiction over this suit is hereby retained by this Court so that any party may bring before the Court any matters within the issues and particularly any failure to comply with the Constitution of the International and the Bylaws of defendant Local 701 and any failure to accord to the membership their rights under the law and the said constitution and bylaws. Either party may move to terminate said jurisdiction at any time."[2]

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never have been permitted to develop when by reason of the manner and method of their selection, their actions might be 'suspect.' What judicial action is suggested in view of the fact in June, 1962, the members will participate in an election which may well resolve at least the most important issues? No serious contention is made that the up-coming election is 'rigged', no such issue appears in the pleadings nor has it developed on the trial, other than suggestion of continuance of 'Cronyism.' Contests appear on the ballot for major offices."

[2] The trial court's memorandum opinion relating to this matter was as follows:

"5. * * * *Let the election take its course.*

"6. And in this connection, I have one suggestion which I feel will promote confidence and accuracy. That is this: De-

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Assuming that there was evidence to support the charge of an abuse of democratic processes in conducting the affairs of the union relating to election of officers, the relief granted was within the power of a court of equity.[3] As we read the record, there was evidence to establish that the defendants failed to observe the union bylaws and constitution relating to the election of trustees and auditors. There also was evidence of irregularities in previous election procedures. This evidence was sufficient to support the order designed to protect the plaintiffs' right to have a fair election.

However, it is contended that even assuming such evidence was produced, plaintiffs have failed to comply with Section 501 (b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 USC § 501 (b), requiring a union member who seeks relief against his union to first request the governing board or officers to sue or secure the appropriate relief and to obtain leave of court before bringing such proceeding.[4]

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fendants propose an election supervised by CPA's. While there is no indication before me that either of the two CPA's who testified is other than honorable and qualified, I would like to see *David Pattullo*, or Myron Gleason Attorney and CPA designated as one of those appointed to supervise the approaching election, reporting to the Court. Also Mr. Pattullo or Mr. Gleason to participate in qtly audits for period of one year."

[3] It is recognized that a court of equity may provide the necessary safeguards to assure a fair union election. See for example, Sibilia v. Western Electric Employees Ass'n., 142 NJ Eq 77, 59 A2d 251 (1948); O'Neill v. United Ass'n of Journeymen Plumbers, Etc., 348 Pa 531, 36 A2d 325 (1944).

[4] Section 501 (b) of the Labor-Management Reporting and Disclosure Act of 1959 (29 USC § 501 b) provides as follows:

"(b) When any officer, agent, shop steward, or repre-

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The trial court concluded that the procedure specified in Section 501 (b) was not intended to be binding upon union members bringing actions in courts of a state where there already existed procedures by which a union member could enforce the fiduciary duties of union officers. We agree with this interpretation of the act. Section 501 (b) could be interpreted to mean that the procedure there specified must be followed in state court proceedings. But Section 603 (a) of the Labor-Management Reporting and Disclosure Act of 1959 indicates the congressional intent to recognize the remedies available in state courts unaffected by the remedies under the federal act unless "explicitly provided to the contrary."

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sentative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

Section 603 (a) of the Labor-Management Reporting and Disclosure Act of 1959 (29 USC § 523 a) provides as follows:

"Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law

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It is not necessary under Oregon law to obtain leave to sue under the circumstances recited in Section 501 (b). Although it is necessary for a complaining union member to exhaust his remedies within the union itself as a condition precedent to judicial relief,[6] the facts in the present case indicate such procedure would have been fruitless.[7] Plaintiffs could not expect relief through a request made to the officer of the local union whose conduct was being challenged. And, although plaintiffs brought the alleged unlawful activities of the defendant officers to the attention of the International Union of Operating Engineers, the International took no action.

We are of the opinion that the controversy was ripe for consideration by the trial court.

Defendants' attack upon the court's jurisdiction is made, not because they object to the judicial supervision of the election but because the court allowed plaintiffs' attorneys fees ($8,500) and reimbursed plaintiffs' counsel for the cost of duplicating and distributing to the union membership copies of the court's memorandum opinion ($222).

Defendants object to the allowance of attorneys' fees, first upon the ground that there is no authorization in the Oregon statutes for the allowance of at-

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or under the laws of any State; and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

See also Wollett: Fiduciary Problems Under Landrum-Griffin, 13 NYU 13th Annual Conference on Labor 267 (1960).

[6] Fox v. Knight, 221 Or 1, 350 P2d 177, 179 (1960); Way v. Patton, 195 Or 36, 45, 241 P2d 895 (1952).

[7] See Mursener v. Forte, 186 Or 253 at 272, 273, 205 P2d 568 (1949).

torneys fees under the circumstances of this case; and secondly because Section 501 (b) limits the allowance of attorneys' fees to cases where there is the "recovery" of money. Having interpreted Section 501 (b) as merely supplemental to state remedies, it follows that we would not be bound by any limitation which that section imposes upon the allowance of attorneys' fees.

Although defendants' first ground of objection presents a more serious question, we are of the opinion that the allowance of attorneys' fees was proper in this case. The authority of a court of equity to award attorneys' fees is not derived solely from the statutes. Equity may under some circumstances as a part of its inherent equitable powers award attorneys' fees. This power is frequently exercised where the plaintiff brings a representative suit on behalf of other members of an organization, as for example where a stockholder brings a derivative suit against a corporation.

Defendants contend, however, that attorneys' fees are allowed in such cases only if the prosecution of the suit results in a pecuniary benefit. Although there is authority supporting defendants' contention, more recent cases have permitted recovery where there was a non-pecuniary benefit to the corporation. We be-

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The part of Section 501 (b) referred to reads as follows:

"* * * The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization * * *"

Treves v. Servel, Inc., 154 A2d 188 (Del Sup Ct. 1959); Saks v. Gamble, 154 A2d 767 (Del Ch 1958); Aaron v. Parsons, 139 A2d 365 (Del Ch 1958), affirmed 144 A2d 155 (Del Sup Ct 1958); Yap v. Wah Yen Ki Tuk et al., 43 Hawaii 37, 42 (1958); Bosch v Meeker Co-op. Light & Power Ass'n., 257 Minn 362, 101 NW2d 423 (1960); Eisenberg v. Central Zone Property Corp., 1 App

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lieve that these recent cases announce the sounder rule.[10] The broader rule is particularly apposite in suits brought by members of a union to correct evils in union management. The preservation of the democratic process in the functioning of unions is a matter of primary concern, not only to union members but to the public as well. Litigation which results in correcting abuses of this process frequently may not give rise to an ascertainable pecuniary benefit. But the fact that no money or property is involved does not detract from the importance of the litigation. Those members of the union who in good faith seek to preserve the internal democracy of their union should not have to bear the expense of a successful suit. We hold that plaintiffs were entitled to attorneys' fees. The fee allowed by the trial court was reasonable.

The trial court allowed plaintiffs $222 which was the cost of reproducing and distributing to the union membership 4800 copies of the court's order. This is not an item of disbursement within ORS 20.020. However, under proper circumstances a court of equity would have the power to order the defendants to duplicate and distribute copies of the court's opinion or to pay the cost of doing so. But we are unable to find anything in the record other than the statement of

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Div2d 353, 149 NYS2d 840 (1956), affirmed 3 NY2d 729, 163 NYS2d 968, 143 NE2d 516, cert. denied, 355 US 884, 78 S Ct 151, 2 L Ed2d 113 (1957); Martin Foundation, Inc. v. Phillips-Jones Corp., 283 App Div 729, 127 NYS2d 649, affirmed, 306 NY 972 120 NE2d 230 (1954); Long Park, Inc. v. Trenton-New Brunswick Theatres Co., 299 NY 718, 87 NE2d 126 (1949).

[10] It has been suggested that the rule should be stated even more broadly, permitting recovery of attorneys fees even in the absence of benefit if the public interest is served by bringing the suit. Cf., Note, 13 Stan L Rev 146 (1960); 45 Minn L Rev 164 (1960); Note, 48 Calif L Rev 843 (1960).

plaintiffs' counsel explaining why this cost was imposed upon defendants. Therefore it is disallowed.

The decree of the lower court, as modified by the disallowance of the sum of $222, is affirmed.